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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

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STATEMENT

The jury returned a verdict for Plaintiff (Petitioner) to recover Ten Thousand Dollars from the Defendant (Respondent) on account of personal injuries she received while riding in his automobile when it collided with another automobile and judgment was entered by the United States District Court for the District of Vermont accordingly (494, 500).*

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*Figures in parentheses refer to folios of the Record.

Before the case was submitted to the jury, Defendant moved that a verdict be directed in his favor claiming the evidence did not tend to show gross negligence. This motion was denied (467).

The Defendant appealed to the United States Circuit Court of Appeals for the Second Circuit. That Court held that the District Court should have directed a verdict for the Defendant, and acting under Rule 50(b) of the new Rules of Civil Procedure for the District Courts of the United States, ordered that the Plaintiff's complaint be dismissed. (See pages 181-186 of the Record.)

The case is here on certiorari.

Two questions are involved:

(1) Should the Defendant's motion for direction of a verdict have been granted?

(2) Should the Circuit Court of Appeals have remanded for a new trial because the Defendant did not move to have the verdict and judgment set aside?

Plaintiff was a guest occupant of Defendant's car when about 11:30 A.M., August 27, 1936, it met and collided with a car driven by Wilson on a sharp curve on a narrow country road in Vermont where there was little travel and cars going both ways used the same wheel tracks, excepting, of course, when passing. Plaintiff called it a single lane road (289).

Only five or six families lived on the road.

Plaintiff is required to establish gross negligence by Section 5113 of the Public Laws of Vermont, which reads:

> "P. L. 5113. Liability of operators to guest occupants; exceptions. The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of such vehicle unless such owner or operator has received or contracted to receive pay for the carriage of such occupant, or unless such injuries are caused by the gross or wilful negligence of the operator."

As one travels northerly as defendant's car was traveling, the road runs downgrade in an easterly direction along the south side of Williams River (106, 191, 193, 194; Defendant's Exhibit E). The road then turns north through about

a sixty degree angle (106, 107, 109, 110, 123) and crosses Williams River via a covered bridge.

In the vicinity of the place where the accident occurred, the highway is of dirt or gravel surface (114, 115, 194, 271), is about twelve or fourteen feet wide with a hard packed single set of wheel tracks in the center and dirt shoulders on both sides (271, 272, 311, 356, 357) widening somewhat at the curve just before entering the bridge (357).

The bridge near the south end of which the collision occurred is a wooden covered bridge about 115 feet long (157) with solid sides except for short sections on the east and west sides near the south end, which are open except for criss-crossing timbers (105, 135, 136, 138, 139, 130 and Plaintiff's Exhibit 14 and Defendant's Exhibit A). The flooring of the bridge was of planks laid at right angles to the length of the bridge; these planks were about 12 feet 6 inches long so that the traveled way within the bridge was 12 feet 6 inches in width except near the south end where a plank laid lengthwise to the bridge increased the width of the traveled portion to 13 feet 6 inches for a distance of about 12 feet (140, 141, 146, 148, 149).

South of the bridge there were guard rails along both sides of the road very close to the edge of the traveled portion thereof (377, 378). On the west and north of the road south of the bridge, between the road and the river grew bushes and trees which to some extent obstructed the vision of persons going south out of the bridge and approaching the bridge from the south or west (187, 188, 194, 195, 196, 312, 313, 410). The defendant testified that the entrance to the bridge was obscured until he reached a point 30 feet from it (410, 411).

Near the south entrance to the bridge, the highway is about 15 to 16 feet wide; at its widest point on the curve, it is about 17 feet wide and its general width westerly of the curve was about 12 to 14 feet (356, 357, 358, 359, 371, 372). On the southerly and easterly side of the road near the curve was a small stream, fed by a spring, which made the road soft and wet along the outside of the curve (359, 360, 369, 370, 371, 395, 396). In addition there was a fairly sharp drop between the edge of the road on the outside of the curve and the guard rail (153, 154, 360, 361).

Defendant's Exhibit E, being a plan of the scene of the accident, and Defendant's Exhibit A, being a photograph looking toward the south end of the bridge from a point a short distance southwest thereof, will materially assist the Court in visualizing the scene of the collision. Defendant's Exhibit A was marked to indicate the approximate locations of his car and the Wilson car after the collision occurred (391, 392, 393, 394).

The Defendant was driving a V-8 Ford, model 1934 Tudor Sedan (260, 388). On the front seat with him was one of his neices. On the left side of the rear seat was another neice and plaintiff, his wife's sister, was sitting on the right side of the rear seat (191, 197, 198, 268).

As Defendant drove along this dirt road approaching the point where the accident occurred, he was driving in the beaten wheel tracks in the center of the road; it being agreed by all parties that the center was the usual place for traveling except when meeting other vehicles (271, 272, 286, 287, 288, 289, 390). He followed the regular track until he saw the Wilson car (413, 440, 441). In traveling along the dirt road Defendant was driving at about fifteen miles per hour (341, 389, 402, 418, 421, 422). No witness places his speed any higher than that at any time.

Defendant was paying close attention to his driving and there was nothing about his conduct which called forth any comment, protest or suggestion from the plaintiff or any of the other passengers (203, 273, 283, 406). No one made any suggestion to Defendant as to the way he drove the car until the instant before the collision when defendant ejaculated "Oh God" (283).

At the time when defendant's car was approaching the Williams River bridge, from the south, Wilson, who lived some distance north of the bridge, was approaching the bridge from the north (295, 296, 314).

As Defendant approached the curve leading into the bridge he continued to travel in the regular beaten tracks which swung slightly to the left hand side of the road on the curve (191, 198, 271, 272, 273, 303). The tracks did not cut over to the left until they reached the curve (408, 409, 440, 441) and he was traveling in the regular beaten tracks (271, 272, 394).

When Defendant was from twenty-five to thirty feet away from the southerly end of the bridge and rounding the curve, he saw the Wilson car emerge from it traveling towards him (209, 210, 211, 273, 274).

The Wilson car was on its own side of the road, next to the guard rail; it was as far over on its own side of the road as it could get (199, 200, 301, 302, 404, 429).

Wilson testified that he was going only about two miles per hour when he came out of the bridge (341), although defendant's testimony indicates that he was going very materially faster (390, 436, 441, 445). Wilson also testified that he blew his horn before entering the bridge and just before he came out of the bridge (300, 304, 309, 314). There is no testimony that Defendant nor any of his passengers in his car heard the Wilson horn (406, 407).

As soon as Defendant saw the Wilson car come out of the bridge, he pulled hard to the right and slammed on his brakes (191, 192, 199, 304, 390, 394, 409, 441). He had very little time in which to do anything (274, 275, 414, 444).

Wilson saw Defendant's car at about the same instant; he applied his foot and emergency brakes and kept as far over on his own side of the road as possible (302, 304, 305).

The left front end of Wilson's car and the left front of Defendant's car collided as a result of which the Plaintiff received her injuries.

Defendant was thoroughly familiar with the highway at the point where the collision occurred (411, 412). He knew that the curve was dangerous and that in order for two cars to pass at that point, they must be going "at a snail's pace" (420, 421, 423, 424, 436).

From Plaintiff's "bill of particulars" (61, 65) it would appear that plaintiff claims gross negligence because defendant drove to the left of the center of the highway as he approached the curve just south of the bridge, that he was traveling at the grossly negligent and unsafe rate of speed of about fifteen miles per hour and failed to blow his horn or give some other warning as he approached the curve at the southerly entrance to the bridge.

ARGUMENT

I. DEFENDANT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED AS THE EVIDENCE DOES NOT TEND TO SHOW GROSS NEGLIGENCE.

The opinion of the Circuit Court of Appeals contains an accurate and concise statement of Vermont law on what constitutes gross negligence. It may assist this court in consideration of the Vermont cases if we amplify that opinion some.

It has been repeatedly stated by the Vermont Court that there is no concrete rule by which the existence of gross negligence can be determined, for each case must be judged by its own facts. But the facts in each case must be considered in the light of accepted principles of law.

Kelley v. Anthony, (*Vt.*-1939) 8 *Atl.* (2*d*) 641
Hall v. Royce, 109 *Vt.* 99, 104, 192 *Atl.* 193
Powers v. Lackey, 109 *Vt.* 505, 506, 1 *Atl.* (2*d*) 693
Rich v. Hall, 107 *Vt.* 455, 459, 181 *Atl.* 113

The "accepted principles of law," applicable to the determination of the existence of gross negligence, are laid down in *Shaw, Admr. v. Moore*, 104 *Vt.* 529: (See opinion of the Court of Appeals.) They have been repeatedly and consistently followed and their application to the facts here set forth, must govern the decision in this case.

An analysis of the decisions by the Supreme Court of Vermont upon the subject will demonstrate that in every case in which a jury would have been or was justified in finding a defendant guilty of gross negligence, there existed some circumstances which were indicative to the Defendant of the existence of a potentially dangerous situation and a neglect or refusal on the part of the defendant to modify his course of conduct in the face of such circumstances.

Thus in *Powers v. Lackey*, 109 *Vt.* 505, 1 *Atl.* (2*d*) 693, defendant drove into a heavy bank of fog so dense that nothing could be seen beyond the radiator of the car, continued on the left or wrong side of the road for 100 feet and

made a sharp left turn directly in front of an oncoming car proceeding on its own side of the road. In *Farren v. McMahon*, 110 *Vt.* 55, 1 *Atl.* (2d) 726, 727, a warning stop signal of a preceding motorist was disregarded at a time when an approaching car was about to meet and pass and defendant, unable to stop, drove his car into a ditch. In *Hall v. Royce, Supra*, the presence of a car parked on the side of the road ahead of the defendant at night, but which was known by defendant at a time when there was ample opportunity to stop or to turn out and pass safely, was not heeded until too late to avoid collision. In *Senecal v. Bleau, et al*, 108 *Vt.* 486, 189 *Atl.* 139 and *Rich v. Hall, Supra*, the presence of other vehicles approaching at right angle highway intersections although well known to defendants, were wholly ignored by defendants who proceeded forward without any regard for them.

In each of these cases there was an element of culpability disclosed, presenting an omission respecting legal duty of an aggravated character, sufficient to permit a jury reasonably to find what amounted to an indifference to legal duty and to utter forgetfulness of legal obligations so far as the safety of plaintiffs were concerned.

In the instant case, the foregoing rule is wholly inapplicable. Here, although it appears from the evidence that the defendant knew from long acquaintance with the particular section of roadway that in order to meet and pass with safety a vehicle coming from the opposite direction, it was necessary to travel at "a snail's pace," it also appears that the plaintiff had traveled over this particular section of highway on several occasions (194, 287) and made no protest at the manner in which the Defendant was operating his car, because as she says there was no reason for doing so (283). This certainly does not indicate speed of such an aggravated character as denotes indifference or utter disregard on the part of defendant, of plaintiff's safety.

Defendant has been unable to find any judicial determination of "a snail's pace," but submits that the rate of fifteen miles per hour at which the defendant was traveling is not sufficiently in excess of such indeterminate rate as to constitute a "failure to exercise even a slight degree of care,"

or "a heedless and palpable violation of legal duty respecting the rights of others."

Defendant further submits that his failure to keep to the right of the center line of the highway when considered in connection with the undisputed fac. that he was at all times traveling in the usual path or tracks, and that by so doing he was also avoiding the soft spot on the outside of the curve and the sharp drop-off outside the edge of the traveled way, does not constitute so open and palpable a disregard for the safety of the plaintiff as to warrant the finding that he was guilty of gross negligence within the meaning of that term as consistently defined by the Supreme Court of Vermont.

It is conceded that this was a country dirt road, of a type familiarly known as a "backroad," having very little travel. There were but five or six families living along the entire length of it. Approaching traffic was not reasonably to be anticipated, at least in any volume.

As stated by the Circuit Court of Appeals, all the evidence tends to show Defendant was going about fifteen miles per hour. The road the Defendant was driving the car on was such as to necessitate a low speed and to call forth protests of occupants if a car was driven fast over it. There were no such protests.

Wilson testified that he should judge Defendant's car was going over fifteen miles per hour. As the burden of proof was on Plaintiff and the witness was not asked how much faster, this answer cannot be construed as contradicting the other testimony that the speed was about fifteen miles per hour. Wilson saw Defendant's car coming toward him for only an instant before the accident and had poor opportunity to judge its speed.

The only other evidence relied upon by Plaintiff in respect to speed of Defendant's car was (1) Plaintiff said there was an "awful crash" and (2) the left front wheel of Defendant's car drove the right rear wheel of Wilson's car through the guard rail. But such testimony is too indefinite and any attempted inference as to speed so speculative as to make it negligible.

Until the defendant actually saw the Wilson car emerging from the southerly end of the bridge, there is no evidence

that the defendant knew that another car was approaching. Although Wilson testified that he sounded his horn twice, neither the plaintiff nor the defendant heard it. The defendant was only twenty-five or thirty feet from the bridge when he saw the Wilson car. Both the defendant and Wilson agree that the defendant pulled sharply to the right almost immediately. In addition it is apparent from the undisputed testimony with respect to speed and distance that the defendant had slightly more than one second in which to react to the situation confronting him and to put his car in a place of safety.

The plaintiff in this case has apparently based her efforts to recover upon the theory that because an accident occurred, and she received an injury, gross negligence is to be presumed. Such a doctrine does not even apply with respect to ordinary negligence, to say nothing of gross negligence. *Johnson v. Burke*, 108 *Vt.* 164, 168, 183 *Atl.* 495; *Williamson v. Clark*, 103 *Vt.* 288, 291, 153 *Atl.* 448. The burden was upon her to make out a case warranting submission of gross negligence and this set of facts would not sustain the burden. *Kelley v. Anthony, supra.*

In the *Kelley* case the evidence tended to show that defendant entered the curve there involved, at a speed of about fifty miles per hour on the wrong side of the road. It is indicated that should one enter some curves at such a speed and in such a manner, and an accident result from the presence of approaching traffic, it might warrant submission of the issue of gross negligence to the jury, but that there must be something more than an error of judgment or momentary inattention in order to indicate an indifference to the duty owed to a guest or an utter forgetfulness of her safety.

Although the car was out of control after it entered the curve, the court held that there was no evidence of any act or omission of defendant amounting to gross negligence operating as the cause. So the inquiry was as to whether the defendant was grossly negligent after that time, in failing to get control of it, and avoiding the accident, during the approximately four hundred feet before it hit a telephone pole and came to a stop. It was held that there was no evidence from which it could be inferred that defendant could have done anything which he failed to do in the way

of regaining control and keeping the car within the limits of the road, or that he did something which he should not have done in that respect which amounted to gross negligence.

Plaintiff strongly stressed the evidence tending to show that defendant entered the curve in violation of the provisions of P. L. 5110, Subd. IX, which was the section most strongly relied upon there, and which provides:

> "IX *Curves.* All curves shall be approached and entered with due care to avoid accident, and all vehicles rounding the same shall keep as far to the right hand side of the highway as reasonably practicable and proceed with due care to avoid accident";

To that contention, the response of the Court, which is particularly pertinent to the instant case, was as follows:

> "Whether or not there was any negligent violation of P. L. 5110, subd. IX, under the facts and circumstances here disclosed, or negligence in other claimed respects, sufficient to make a jury question as to ordinary negligence, we are not called upon to decide. It is clear that the conduct of the defendant both before and after entering the curve was not such as it could reasonably be inferred was the result of an indifference to his guest or an utter forgetfulness of the latter's safety, and consequently gross negligence is not shown. Franzoni v. Ravenna, supra; Powers v. Lackey, 109 Vt. 505, 1 A 2d. 693."

Judgment on a directed verdict in favor of defendant was affirmed.

In the *Shaw-Moore* case, the fact that defendant drove so close to a guardrail that plaintiff's intestate (standing on the running board) was crushed between it and the car, receiving injuries from which her death resulted, did not make a case for submission to the jury. The Court said that although the jury question might be free from difficulty if addressed to the issue of ordinary negligence, to entitle a guest plaintiff to submission of the issue of gross negligence, the "case must contain an element of culpability of an aggra-

vated character which is substantially and appreciably higher in magnitude than that which characterizes ordinary negligence."

In *Franzoni v. Ravenna, supra,* defendant was driving his car over a road that was deeply rutted, the walls of the ruts being frozen. There were two sets of ruts and instead of taking the ones on the right, he was driving with his right wheels in one set of ruts and his left wheels in the other set. He saw a truck approaching from the opposite direction. Instead of stopping he persisted in attempting to pull out of the ruts. He got his front wheels out but was unable to get the rear wheels out, so he pulled the front wheels back into the ruts. Again he attempted to force the car out of the ruts, and continued in this attempt until it was too late to stop, and the car crashed into the truck, resulting in the plaintiff's injuries. Reversing a judgment in favor of the plaintiff, and holding that there was no liability, the Court used language that is particularly pertinent here: (p. 65)

> "Tested by this rule, the record before us fails to justify a recovery against Ravenna. That he was careless, either in getting into the two ruts he appears to have chosen, or in his persistent attempts to force his car out of them, or both, may be admitted. That he should have stopped his car long enough before he hit the truck to have avoided a collision is quite apparent. But he was all the time trying to avoid an accident. He was doing his best to accomplish that result. He made a mistake, to be sure, perhaps a series of them, but he was not so far wrong as to evoke a protest from any of his passengers, and there is nothing in the record to indicate an indifference to his duty to his guests or an utter forgetfulness of their safety."

So in *Anderson v. Olson, supra,* defendant was driving on a descending road, about twenty-five feet in width, on the right of which was a white guardrail. It was after one o'clock in the morning, but visability was good. It was not claimed that the speed was excessive. He noticed that he was close to the guard rail and fearing his car would collide with it, he swung sharply to the left. The car turned almost

directly across the road, struck a bank, ran part way up it and overturned, resulting in injuries to the plaintiff, a guest passenger. If he had not turned to the left, or if he had not turned so far in that direction, the car would have remained in the road without mishap. Had he applied his brake after making the turn, the accident would not have occurred. He "got nervous and lost his head."

Again reversing a judgment for plaintiff, and again holding there was no liability, under this statute, the Court said: (p. 71, 72)

> "Gross negligence has been defined in *Shaw, Admr. v. Moore*, 104 *Vt.* 529, 531, 162 *Atl.* 373, 86 *A. L. R.* 1139, and *Dessereau v. Walker*, 105 *Vt.* 99, 101, 163 *Atl.* 632, and it is not necessary to repeat what has been stated therein. It is sufficient to say that the foregoing facts do not bring this case within the definition. Negligence there may have been, but nothing appreciably higher in degree and more culpable than that. There must be something more than an error in judgment, momentary inattention, or loss of presence of mind, in circumstances such as these, in order that there may be indicated an indifference to the duty owed to a guest or an utter forgetfulness of his safety. See *Franzoni v. Ravenna*, 105 *Vt.* 64, 66, 162 *Atl.* 564."

In *L'Ecuyer v. Farnsworth*, 106 *Vt.* 180, 170 *Atl.* 677, a verdict was directed for defendant. The judgment thereon was affirmed by the Supreme Court. Plaintiff was a guest passenger in defendant's car which was being driven at his request by a third party. They were driving over the main cement highway between Burlington and Vergennes in the evening. It was cold and raining, the road being slippery in places where the rain had frozen on the paved surface of the highway. Plaintiff had noticed two slippery places and shortly before the accident occurred, she had asked the driver once or twice "not to go too fast." Suddenly the rear of the car skidded to the left, made a half turn on the cement, again skidded and slid backward about two hundred feet, and off the cement and against a tree some six or eight feet from the

shoulder of the road. On the question of gross negligence, the Court held:

> "Even if it could be said that the accident was caused by the negligence of Miss Leonard, there is nothing in the record that indicates an indifference by her to her duty to her guest or an utter forgetfulness of her safety, which is the test of gross negligence. *Shaw, Admr. v. Moore*, 104 *Vt.* 529, 531, 162 *Atl.* 373, 86 *A. L. R.* 1139; *Franzoni v. Ravenna*, 105 *Vt.* 64, 66, 163 *Atl.* 564; *Dessereau v. Walker*, 105 *Vt.* 99, 101, 163 *Atl.* 632; *Anderson v. Olson*, 106 *Vt.* 70, 169 *Atl.* 781 (*decided January Term*, 1934)."

In *Garvey v. Michaud*, 108 *Vt.* 226, 184 *Atl.* 712, plaintiff, a sister-in-law of defendant, was riding as a guest passenger in defendant's car, operated by himself, over the highway between Bristol and New Haven. The road was icy. Defendant was driving twenty-five to thirty miles an hour, following a large truck going in the same direction, and from thirty to seventy-five feet from it. No claim was made that defendant was negligent before he arrived in near proximity to the scene of the accident. As they came to a rising grade defendant followed the truck up the hill, gaining somewhat. He did not try to pass it, but as he neared the top of the hill he noticed that the truck, after it passed over the crest and started down the other slope, did not gain momentum. As defendant passed over the top of the hill the truck was fifty to seventy-five feet ahead of him. The truck, with no stoplight, and without warning, stopped or practically so, while it was going down the hill, and as it was about to meet a car coming from the opposite direction. As defendant came over the top of the hill, he saw that it was slowing down. He applied his brakes, but by reason of the icy condition of the road his car slid down the hill some seventy to one hundred feet and collided with the rear of the truck, the collision causing plaintiff's injuries. He could not turn to the left and avoid the collision because of the approaching car. He could not turn to the right on account of a high bank.

In reversing a plaintiff's judgment and holding that a verdict should have been directed in defendant's favor, the Court said: (p. 233)

> "While the defendant may have made a mistake in judgment, which amounted to negligence, in driving too close to the truck as he followed it up the hill, or in suddenly applying his brakes so that the wheels of his car were set, there is nothing in the evidence that indicates an indifference by him to his duty to his guest, or an utter forgetfulness of her safety. The defendant's operation of his car did not evoke any protest from the plaintiff, although she testified that she did not protest, because she feared if she did he would drive faster.
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> * * * * * * *
>
> "While the defendant may have been negligent in getting into such a perilous situation, he was not wholly to blame for it. Other circumstances, over which he had no control, contributed to that situation. The evidence is sufficient to warrant a finding that the defendant was guilty of negligence in the operation of his car, but it is not sufficient to warrant a finding that he was guilty of gross negligence. The court below erred when it denied the motion of the defendant for a directed verdict. The judgment against the defendant Michaud is reversed, and judgment for him to recover his costs."

The most recent decision of the Vermont Supreme Court which holds that the issue of gross negligence was proper for submission to the jury, is *Ellison v. Colby*, 8 *Atl.* (2d) 637, decided at the same time as *Kelley v. Anthony, supra*, at the October Term, 1939.

This case well illustrated the factual elements which must exist in order to present a jury question on the issue of gross negligence. The accident happened about 1:30 A.M. on October 10, 1938, three or four weeks after the hurricane and flood of September, 1938, on the road from Chester to Rawsonville via Simonsville. Every bridge on the road (there were several) had been washed out at one end or the

other. For at least six miles the road was under construction and repair. Defendant had driven over it earlier in the evening and had traversed two-thirds of the distance on the return trip. Flares and other warning signs and danger signals existed, including such "down away from the bridge (where the accident happened) below it, so as to give anyone ample chance." There had been a big washout at the east end of the bridge where the accident happened. It had been filled in with sand and soft dirt, over which there was a temporary roadway about nine feet wide, the traveled portion of which had been packed reasonably hard by the dual wheels of the construction trucks which dumped the fill. There was nothing to prevent cars from going off the sides of the fill at the approach to the bridge except that a bank of fill material about two feet high by three feet wide had been pushed up on either side. The nine foot passageway was about at the center of the bridge opening, so that one traveling over the bridge had to travel in the middle, otherwise his right wheels would strike into the soft material of the embankment at the right. Or if he traveled to the left of the middle, his left wheels would strike the soft material of the embankment at the left. The driver had been cautioned on the way over once or twice about his speed, but notwithstanding that, and aware of the condition of the road, on his return trip at 1:30 o'clock in the morning, he increased his speed to around fifty miles per hour, and as his car crossed the bridge, the right wheels hit the soft fill of the embankment, plowed off the highest part of it for a distance of twelve to fifteen feet, went down the embankment, tipped over, and injured the plaintiff. Affirming a plaintiff's judgment, the Court held:

> "Under these circumstances and others disclosed by the evidence it was competent for the jury to infer that the act of the defendant in crossing the bridge and driving upon the fill at a speed of around fifty miles per hour was not due to momentary inattention, error in judgment or loss of presence of mind, but was a failure to exercise even a slight degree of care and was the result of an indifference to his duty to his guests or an utter forgetfulness of the latter's safety."

For the convenience of the Court we refer to the remaining cases other than those hereinbefore referred to, which have come to our attention, construing the "gross negligence" statute, and which have approved submission of the issue to the jury.

In *Dessereau v. Walker*, 105 *Vt.* 99, the plaintiff and defendant, together with five others, were returning from the Morrisville fair to Barre, sometime after midnight in a Model T Ford roadster with a rumble seat. There was a heavy fog which obscured the sight of the road and caused the lights to reflect back. The windshield was opaque from the moisture of the fog. The wiper was not in operation. The defendant drove leaning out to the left of the car, looking around the edge of the windshield. More than once the plaintiff warned the defendant to go slower, because of the bad night and the crowded condition of the car. Several of the others remonstrated. The warnings were numerous and repeated. Between one and two hundred feet of a sharp curve they entered a bank of fog so dense that the guard rails alongside the road were invisible. The car was being operated at about forty miles per hour, on the left hand side of the road. It struck a soft shoulder on the outside edge of the curve, went off the highway and was overturned causing plaintiff's injuries.

Holding that a defendant's motion for a verdict was properly over-ruled, and judgment rendered for plaintiff, the opinion concludes:

> "In view of the evidence of the speed of the car, the lack of visibility, the heavy load due to the number in the automobile, and the repeated warnings from the other members of the party, we think that it cannot be said as a matter of law that there was a lack of evidence fairly and reasonably tending to show that the defendant was guilty of conduct which contained an element of culpability of an aggravated character substantially and appreciably greater in magnitude than that which characterizes so-called ordinary negligence, and amounting to gross negligence within the definition of that degree as hereinbefore stated. There was no error in the denial of the motion."

The remaining case is *Hunter v. Preston, et als*, 105 *Vt.* 327. In that case plaintiff, a guest passenger of one Midgely, a defendant, received injuries when Midgely's car collided with Preston's car which was parked on North Avenue in Burlington. The evidence showed that Midgely was driving at night over an icy, slippery street, without chains, and knew the dangerous condition of the highway. Other evidence showed that he was traveling thirty-five to forty miles an hour. He was blinded by the lights of the car of one Hinsdale, another defendant, which was standing on the opposite side of the street facing the direction from which Midgely was coming, so that he was unable to see Preston's car, parked on Midgely's right hand side of the street until he was within thirty-five to fifty feet. He then applied his brakes, but hi car slid over the icy surface crashing into Preston's car, weighing with its load 3,500 pounds, with such force as to move it ahead its full length.

The Court held the evidence made a case for the jury on the same issue of gross negligence, but not of "wilful" negligence, as Midgely did not see the Preston car until it was too late to avoid it. As the complaint charged him both with gross negligence and with wilful negligence, and both issues had been submitted to the jury, the judgment was reversed for the error in submitting the question of wilful negligence.

One needs but to compare the factual situations in the cases wherein the Court has held the issue of gross negligence properly submitted, with those in which the Court has ruled as a matter of law, that the evidence presented no question for the jury, to note the distinction which it makes between the two classes of cases. The fundamental element which characterizes the former is the presence of evidence of negligence of an aggravated character which clearly denotes "an indifference to his duty to his guest and an utter forgetfulness of the latter's safety."

It is most respectfully insisted that such an element is totally lacking in the instant case, and that in the view most favorable to the plaintiff, her case falls within the latter class.

The evidence in the case, taken in the light most favorable to the plaintiff, wholly refutes any claim of a "failure to exercise even a slight degree of care." It fails to establish

"any act or omission" on the part of the defendant "respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care." It precludes a finding of "very great negligence, or the absence of slight diligence or the want of even scant care."

To hold that defendant's conduct could be found to be "a heedless and a palpable violation of legal duty respecting the rights of others" and to "amount to indifference to present legal duty, and to utter forgetfulness of legal obligation so far as other persons may be affected," would amount to completely repealing the so-called "guest" statute and to saying that any case which presented a situation where the ordinary rule of negligence applied was sufficient evidence upon which gross negligence could be found. This would be contrary to the repeated declarations of the "applicable principles of law" to cases where the establishment of gross negligence is essential under the statute to entitle the plaintiff to recover. Unless this well established distinction is recognized and observed all negligence will gradually be absorbed into the classification of gross negligence (see *Quinlivan v. Taylor* (*Mass.*) 10 *N. E.* (2*d*) 96; the statute will become meaningless, and the object and purpose of the Legislature in changing and modifying, by statute, the rule of the common law, will be completely and effectively thwarted and set aside.

The law of Vermont, as interpreted and applied by its highest Court has consistently observed this distinction between ordinary negligence and gross negligence, and preserved the object and purpose of the statute, and it governs the determination of the issues presented by this exception. Under the law of Vermont, there was no question for submission to the jury on the issue of gross negligence.

II. THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT DID NOT ERR IN ORDERING A DISMISSAL OF PLAINTIFF'S COMPLAINT.

Plaintiff claims that the Court of Appeals upon reversing the case, had a right only to order a new trial and could not dismiss the complaint, because Defendant failed in the Dis-

trict Court to move to set aside the verdict and judgment. This question turns on the application of Rule 50(b) of the Rules of Civil Procedure for the District Courts of the United States set out below.*

In *Slocum vs. New York Life Insurance Company*, 228 *U.S.* 364, 57 *L. ed.* 879 this Court held that it was a violation of the Seventh Amendment for a United States Court on appeal to enter judgment for the Defendant after ruling that the Defendant's motion for a verdict made before submission to the jury and without reservation was improperly denied, and that the Plaintiff was entitled to a mandate ordering a new trial.

Had the instant case been tried prior to the adoption of Rule 50(b), it is clear from that decision and *Aetna Insurance Company vs. Kennedy*, 301 *U. S.*, 389, 81 *L. ed.* 1177, that the Circuit Court of Appeals would have committed error in dismissing the complaint.

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*Rule 50—Motion for a Directed Verdict.

(b)—Reservation of Decision on Motion.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

In *Baltimore and Carolina Line Inc. vs. Redman*, 295 *U. S.* 654, 79 *L. ed.* 1636 this Court held that where the Trial Court reserved decision on a motion made for verdict by Defendant before submission to the jury, and after verdict, denied the motion, the Appellate Court upon finding that the motion should have been granted, could dismiss the complaint. It is apparent from the reported case that no motion to set aside the verdict was made.

This Court found this procedure to be in accordance with common law practice before adoption of the Seventh Amendment, and therefore not in violation of it.

Rule 50(b) was adopted to make self operative the procedure approved in the *Redman* case. Its purpose was to speed litigation and to prevent unnecessary retrials. (See *Montgomery, Ward & Co. vs. Dunton, decided December* 9, 1940, 85 *L. ed. Adv. Ops.* 132, 136.) It sought to incorporate into the practice of the District Courts of the United States a rule of procedure of the common law recognized prior to the adoption of the Seventh Amendment, which permits Appellate Courts to reverse judgments rendered upon jury verdicts and enter final judgment in behalf of the party against whom verdict and judgment have been rendered.

It is no longer necessary for the District Court to say that it reserves decision on the motion for a verdict. The rule expressly qualifies the denial with a reservation of decision, which makes it possible for the Appellate Courts to enter judgment for the moving party. That reservation in and of itself and without anything more than entry of judgment, makes operative the practice of common law as it was before adoption of the Seventh Amendment.

After verdict, either of its own motion or as provided in the Rule, upon the filing of a motion to have the verdict set aside, the Court must finally rule upon that motion for a verdict.

The Plaintiff claims in her brief that in addition to the formal reservation of decision, pending the jury verdict, the common law practice required a new motion after verdict (Petitioner's Brief, Pages 22 and 23). No case cited supports that contention.

The common law practice did not require or even contemplate the making of a new motion after verdict. In case

of reservation, the original motion (not a later one) was disposed of by the Court.

The decisions in *Baltimore and Carolina Line Inc. v. Redman, Supra* and in *Lewis-Kures et al vs. Walsh & Co. Inc.*, 102 *Fed. 2nd* 42, 44 certiorari denied 308 *U. S.* 596, 84 L. ed. 499 demonstrate that Plaintiff's contention is erroneous.

Rule 50(b) was not intended to change the common law rule by requiring new motions to be filed after verdicts.

The provisions of Rule 50(b) which permit a new motion within ten days after verdict serve a useful purpose in permitting a party who has moved for a directed verdict to prepare and advance, if he so chooses, a more accurate and studied presentation of his grounds and arguments, than is possible in open court during the period between the closing of the evidence and the submission of the case to the waiting jury. Such right is for the benefit of the moving party, if he expects that the opportunity for a more considered presentation and ruling will alter the position of the Court. A new motion should not, however, be held to be a condition precedent to the exercise by the Appellate Court of the power to render final judgment upon his motion.

The District Court may finally pass upon the question reserved either by expressly granting or denying it and then enter judgment, or by entering judgment alone. The entry of judgment necessarily carries with it a ruling upon the motion.

The Court having reserved final decision, must dispose of the matter in some way. If it does not act upon this matter separately before judgment, the judgment itself must and does constitute a ruling on the motion.

The judgment necessarily disposes of all questions then pending in the case. In this case a judgment for Defendant without more after verdict would have been a ruling granting the motion for a verdict. As the judgment did not grant the motion for a verdict then pending, it denied it.

The Court might have made another express and separate ruling on the motion but no action the Court could have taken would more effectually deny the motion than entry of judgment for the plaintiff.

Therefore in this case denial of the motion for direction of a verdict before the verdict was rendered, according to the terms of the Rule, automatically reserved decision and the entry of judgment for the Plaintiff after the verdict was rendered was action on the question reserved and a final denial of the motion. The Court of Appeals, therefore, upon finding that the motion should have been granted, was wholly within its rights in taking the action, which the Trial Court should have taken, namely, granting the motion and ordering that Plaintiff's complaint be dismissed.

The Seventh Amendment was not violated. The Rule was complied with. The decisions in *Baltimore and Carolina Line, Inc. vs. Redman* and *Lewis-Kures et al v. Walsh & Co., supra* apply.

CONCLUSION

Respondent submits, therefore, that the judgment of the Circuit Court of Appeals for the Second Circuit in reversing the judgment of the United States District Court for the District of Vermont and in dismissing Petitioner's complaint should be affirmed.

Respectfully submitted,

GEORGE H. O'BRIEN.
By EDWIN W. LAWRENCE,
LEONARD F. WING,
R. CLARKE SMITH,
His Attorneys.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1940.

Margaret Conway, Petitioner, vs. George H. O'Brien. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner, a citizen of New Hampshire, was injured when the respondent's car, in which she was a passenger, collided with another on a country road in Vermont. Diversity of citizenship gave jurisdiction to the District Court and petitioner recovered a verdict under the Vermont guest occupant law,[1] which required her to prove gross negligence on the part of the respondent. The Circuit Court of Appeals, however, considering the evidence of gross negligence insufficient to go to the jury, reversed and dismissed the complaint.[2] We granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) to authorize dismissal of the complaint,[3] but our view of the merits makes it unnecessary to discuss this question.

The result is determined by a consideration of the facts in the light of the Vermont law. The accident occurred in broad daylight in the late morning of an August day. If the facts most favorable to the petitioner were accepted, the jury might have concluded properly that the defendant's car approached from the south a covered bridge on a little used country road at a speed of fifteen miles per hour. Respondent who was the driver and owner sat on the front seat with another. The petitioner and another lady occupied the rear seat. The bridge spanned Williams River which at that point ran eastwardly to join the Connecticut. As another car emerged from its southern end the collision happened.

[1] Vermont Public Laws (1933) § 5113.

[2] 111 F. (2d) 611.

[3] As in Berry v. United States, decided today, the District Court denied respondent's motion for a directed verdict at the close of the case. After verdict, however, the respondent did not make a motion for judgment n.o.v.

The road along which respondent was driving ran parallel with the southernly bank of the river for a short distance and then turned "abruptly," in a "sharper curve than any on the road," at a sixty degree angle down a nine per cent grade towards the bridge. Bushes and small trees cut off the view of a car "coming out of the bridge" until the respondent's car was "probably 30 feet" away.

As respondent's light car came into this curve, he cut in to the left without slackening speed or blowing a horn and suddenly found himself face to face with a larger car coming out of the bridge on its right hand side of the road at two miles per hour. The collision knocked the heavier car backward several feet and through a guard rail on the west side of the bridge approach. The road approaching the bridge "at this blind corner" was sandy, from fourteen to seventeen feet wide. Respondent testified he had known the spot "all my life" and knew cars could pass only "at a snail's pace."

The "Law of the Road" in Vermont is to round curves "as far to the right . . . as reasonably practicable"[4] and to "signal with bell or horn" "in going around a curve."[5]

Under these circumstances we are of the opinion that the Vermont law requires the submission of the question of gross negligence to the jury. As a matter of law it seems quite plain that a jury might find a driver of a car familiar with the locality grossly negligent, when with three guests and without a signal he rounds a blind, sharp curve at fifteen miles per hour on the wrong side into a narrow bridge entrance. The accepted Vermont definition of gross negligence is found in *Shaw* v. *Moore*:[6]

"Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others.

[4] Vermont Public Laws (1933) § 5110-IX.
[5] *Id.*, § 5110-XV.
[6] 104 Vt. 529, 531-532.

The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure."

This has been repeated many times in later cases.[7] The application creates the difficulties. The latest cases say "each case must be judged according to its own facts."[8] Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case.[9] About as many are upon the other side.[10] We think the District Court correctly appraised the law and facts.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[7] Dessereau *v.* Walker, 105 Vt. 99, 101; Franzoni *v.* Ravenna, 105 Vt. 64; Hunter *v.* Preston, 105 Vt. 327, 338.

[8] Ellison *v.* Colby, 8 A. (2d) 637, 640; Kelley *v.* Anthony, 8 A. (2d) 641, 642.

[9] Shaw *v.* Moore, 104 Vt. 529; Franzoni v. Ravenna, 105 Vt. 64; Anderson *v.* Olson, 106 Vt. 70; L'Ecuyer *v.* Farnsworth, 106 Vt. 180; Garvey *v.* Michaud, 108 Vt. 226; Kelley *v.* Anthony, 8 A. (2d) 641.

[10] Dessereau *v.* Walker, 105 Vt. 99; Farren *v.* McMahon, 110 Vt. 55; Hunter *v.* Preston, 105 Vt. 327, 338; Hall *v.* Royce, 109 Vt. 99, 106; Ellison *v.* Colby, 8 A. (2d) 637; Powers *v.* Lackey, 109 Vt. 505.